In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1366

JACK W. BAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1970, and a petition for rehearing was denied on January 19, 1971 (Pet. App. B). The petition for a writ of certiorari was filed on February 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government's impeachment of a defense witness, or the cumulative effect of other asserted errors, denied petitioner a fair trial.

420-215—71

STATEMENT

Petitioner, his business associate, Samuel A. Carmel, and an Internal Revenue Agent, Guy F. Parker, were charged in a six-count indictment with offenses relating to evasion of federal income taxes owed by petitioner's client. Petitioner was convicted on two counts, one charging conspiracy to evade the income taxes of his client and one charging that he procured a false report from Agent Parker; he was acquitted on a third charge of obstructing the administration of the internal revenue laws by offering a bribe to Parker. He was sentenced to concurrent three-year terms of imprisonment. In a lengthy and careful opinion, the court of appeals affirmed (Pet. App. A).

In the practice of his primary occupation of preparing federal income tax returns, petitioner, an attorney, prepared returns for a contractor for 1958, 1959 and 1960, which omitted income of $34,824.80 and understated the taxes owed by $17,495.50 (R. 332–333).[1] Petitioner had told the contractor's bookkeeper that, at the insistence of the taxpayer, he would not use the higher income figures shown in the bookkeeper's computations (Tr. 101–102). The returns were subsequently audited by Agent Parker. In the course of the audit, petitioner requested his business associate, Carmel, to attempt to "reach" Agent Parker, pursuant to which Carmel offered Parker a "loan." Carmel then turned matters back to petitioner and told him to handle any payment to Parker. Shortly thereafter, petitioner told Carmel that he had paid Parker in cash and that

[1] "R." references are to the printed Appendix filed in the court of appeals. "Tr." refers to the transcript of testimony.

the audit would be satisfactorily resolved without penalties being assessed against his client (Tr. 488–489, 571–580, 584).

Parker subsequently submitted an official audit report, detailing the understatement of income but attributing it to what he characterized as the contractor's honestly mistaken belief that he should not report income from certain jobs which had given rise to continuing litigation concerning death or injury to his employees (Tr. 370). In fact there was no such litigation, and thus the reported reason for the understatement was false (Tr. 655). Parker did not verify the "explanation," as he was required to do under standard procedures (Tr. 340–348, 655–656). Notwithstanding the large deficiency, Parker did not assess any penalty because of his determination that the income omission was "honest error" and not negligent or willful.

Petitioner called as a defense witness Agent Parker, who was a co-indictee but whose trial had been severed and postponed (Pet. 12). Parker testified that Carmel had approached him with an offer that might have led to a bribe, but that petitioner never offered him any money (Tr. 691–693). On cross-examination, the prosecutor asked Parker if he had told an Internal Revenue inspector that petitioner was the type of person who would manipulate a return and represent he was thereby saving the taxpayer money, and that any "monkey business" in the contractor's returns resulted from petitioner's connivance and errors of the bookkeeper. Parker denied having made such statements (Tr. 699). Although the prosecutor also asked

Parker if he had related to the inspector his views as to petitioner's general character, Parker did not answer this question (Tr. 701). The inspector testified as a government rebuttal witness that Parker had made the remarks attributed to him, but there was no further reference to petitioner's character.

ARGUMENT

1. Petitioner contends (Pet. 7–11) that the government improperly commented on his character, when that was not in issue, by its cross-examination of Agent Parker and the testimony of the Internal Revenue inspector. But, as the court below correctly held (Pet. App. A 26), the prosecutor was entitled to impeach Parker's direct testimony that petitioner had offered him no money and was not capable of committing bribery, by inquiring about and proving his prior inconsistent statements on this topic. The further question to Parker as to whether his statements to the inspector represented his impression of petitioner's character—a question which Parker did not answer—was not, as the court of appeals found, prejudicial to petitioner and did not necessitate a new trial.

2. Petitioner's claims of various errors in the trial (Pet. 11–15) were carefully reviewed by the court of appeals (Pet. App. A 27–28). As that court held, the record as a whole amply demonstrates that the matters to which petitioner objects did not improperly prejudice his case, and that he received a fair trial. This question turns necessarily on the particular circumstances of the case at hand, and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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